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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON  
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8 JOHN C. MILNES, )  
9 Plaintiff, ) No. CV-08-101-JPH  
10 v. ) ORDER GRANTING DEFENDANT'S  
11 MICHAEL J. ASTRUE, Commissioner ) MOTION FOR SUMMARY JUDGMENT  
12 of Social Security, )  
13 Defendant. )  
14

15 BEFORE THE COURT are cross-motions for summary judgment noted  
16 for hearing without oral argument on October 6, 2008. (Ct. Rec.  
17 10, 13). Attorney Clifford King B'Hymer represents Plaintiff;  
18 Special Assistant United States Attorney David M. Blume represents  
19 the Commissioner of Social Security ("Commissioner"). The parties  
20 have consented to proceed before a magistrate judge. (Ct. Rec. 5.)  
21 After reviewing the administrative record and the briefs filed by  
22 the parties, the court **GRANTS** Defendant's Motion for Summary  
23 Judgment (Ct. Rec. 13) and **DENIES** Plaintiff's Motion for Summary  
24 Judgment (Ct. Rec. 10.)

25 **JURISDICTION**

26 Plaintiff filed applications for SSI benefits and disability  
27 insurance benefits (DIB) in April of 2005 (Tr. 48-50, 236-239),  
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1 amended at hearing for a closed period from March 1, 2005, through  
2 September 30, 2007. (Tr. 12, 20.) The applications were denied  
3 initially and on reconsideration. (Tr. 26-26A, 28-30.)  
4 Administrative Law Judge (ALJ) Hayward C. Reed held a hearing on  
5 October 31, 2007. (Tr. 245-295.) Plaintiff, represented by  
6 counsel, medical expert Allen Bostwick, Ph.D., and vocational  
7 expert Polly Peterson testified. On November 26, 2007, the ALJ  
8 issued a decision finding that plaintiff was not disabled. (Tr.  
9 20.) The Appeals Council denied a request for review on February  
10 28, 2008. (Tr. 4-6.) Therefore, the ALJ's decision became the  
11 final decision of the Commissioner, which is appealable to the  
12 district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed  
13 this action for judicial review pursuant to 42 U.S.C. § 405(g) on  
14 March 26, 2008. (Ct. Rec. 1.)

#### 15 **STATEMENT OF FACTS**

16 The facts have been presented in the administrative hearing  
17 transcript, the ALJ's decision, the briefs of both Plaintiff and  
18 the Commissioner, and will only be summarized here.

19 Plaintiff was 21 years old at onset and 23 when the closed  
20 period ended. He has a high school education and one year of  
21 college. (Tr. 48, 155.) Plaintiff has past relevant work as an  
22 automobile detailer, furniture salesperson and deliverer,  
23 groundskeeper, short order cook and dishwasher, retail salesman,  
24 and pizza maker. (Tr. 53, 58, 264, 268, 272, 274-275.) He  
25 alleges disability as of March 1, 2005, due to depression, bipolar  
26 disorder, attention deficit hyperactivity disorder (ADHD), post  
27 traumatic stress disorder (PTSD), and back pain

1 . (Tr. 52-53.)

2 **SEQUENTIAL EVALUATION PROCESS**

3 The Social Security Act (the "Act") defines "disability"  
4 as the "inability to engage in any substantial gainful activity by  
5 reason of any medically determinable physical or mental impairment  
6 which can be expected to result in death or which has lasted or  
7 can be expected to last for a continuous period of not less than  
8 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The  
9 Act also provides that a Plaintiff shall be determined to be under  
10 a disability only if any impairments are of such severity that a  
11 plaintiff is not only unable to do previous work but cannot,  
12 considering plaintiff's age, education and work experiences,  
13 engage in any other substantial gainful work which exists in the  
14 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
15 Thus, the definition of disability consists of both medical and  
16 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
17 (9<sup>th</sup> Cir. 2001).

18 The Commissioner has established a five-step sequential  
19 evaluation process for determining whether a person is disabled.  
20 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
21 is engaged in substantial gainful activities. If so, benefits are  
22 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If  
23 not, the decision maker proceeds to step two, which determines  
24 whether plaintiff has a medically severe impairment or combination  
25 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
26 416.920(a)(4)(ii).

27 If plaintiff does not have a severe impairment or combination  
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1 of impairments, the disability claim is denied. If the impairment  
2 is severe, the evaluation proceeds to the third step, which  
3 compares plaintiff's impairment with a number of listed  
4 impairments acknowledged by the Commissioner to be so severe as to  
5 preclude substantial gainful activity. 20 C.F.R. §§  
6 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
7 App. 1. If the impairment meets or equals one of the listed  
8 impairments, plaintiff is conclusively presumed to be disabled.  
9 If the impairment is not one conclusively presumed to be  
10 disabling, the evaluation proceeds to the fourth step, which  
11 determines whether the impairment prevents plaintiff from  
12 performing work which was performed in the past. If a plaintiff  
13 is able to perform previous work, that Plaintiff is deemed not  
14 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).  
15 At this step, plaintiff's residual functional capacity ("RFC")  
16 assessment is considered. If plaintiff cannot perform this work,  
17 the fifth and final step in the process determines whether  
18 plaintiff is able to perform other work in the national economy in  
19 view of plaintiff's residual functional capacity, age, education  
20 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
21 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

22 The initial burden of proof rests upon plaintiff to establish  
23 a *prima facie* case of entitlement to disability benefits.  
24 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
25 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
26 met once plaintiff establishes that a physical or mental  
27 impairment prevents the performance of previous work. The burden  
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1 then shifts, at step five, to the Commissioner to show that (1)  
2 plaintiff can perform other substantial gainful activity and (2) a  
3 "significant number of jobs exist in the national economy" which  
4 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
5 Cir. 1984).

#### 6 STANDARD OF REVIEW

7 Congress has provided a limited scope of judicial review of a  
8 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
9 the Commissioner's decision, made through an ALJ, when the  
10 determination is not based on legal error and is supported by  
11 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995  
12 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
13 1999). "The [Commissioner's] determination that a plaintiff is  
14 not disabled will be upheld if the findings of fact are supported  
15 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572  
16 (9<sup>th</sup> Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence  
17 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d  
18 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
19 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
20 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
21 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
22 evidence as a reasonable mind might accept as adequate to support  
23 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
24 (citations omitted). "[S]uch inferences and conclusions as the  
25 [Commissioner] may reasonably draw from the evidence" will also be  
26 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965).  
27 On review, the Court considers the record as a whole, not just the  
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1 evidence supporting the decision of the Commissioner. *Weetman v.*  
2 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v.*  
3 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

4 It is the role of the trier of fact, not this Court, to  
5 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
6 evidence supports more than one rational interpretation, the Court  
7 may not substitute its judgment for that of the Commissioner.  
8 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
9 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by  
10 substantial evidence will still be set aside if the proper legal  
11 standards were not applied in weighing the evidence and making the  
12 decision. *Browner v. Secretary of Health and Human Services*, 839  
13 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial  
14 evidence to support the administrative findings, or if there is  
15 conflicting evidence that will support a finding of either  
16 disability or nondisability, the finding of the Commissioner is  
17 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
18 1987).

#### 19 ALJ'S FINDINGS

20 At the outset, the ALJ found plaintiff met the DIB  
21 requirements through June 30, 2006. (Tr. 14.) At step one the ALJ  
22 found that plaintiff has not engaged in substantial gainful  
23 activity during the closed period of March 1, 2005 through  
24 September 30, 2007, although he made unsuccessful work attempts.  
25 (*Id.*) At steps two and three, the ALJ found that plaintiff  
26 suffers from back pain and depression, impairments that are severe  
27 but which do not alone or combination meet or medically equal a  
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1 Listing impairment. (Tr. 14-16.) Prior to step four, the ALJ  
2 found plaintiff is physically able to perform medium exertion  
3 work. Plaintiff's mental impairments cause moderate impairment in  
4 two areas, the ability to maintain attention and concentration for  
5 extended periods and to interact appropriately with the general  
6 public. (Tr. 17.) The ALJ found plaintiff less than completely  
7 credible. (Tr. 18.)

8 At step four, relying on the VE's testimony, the ALJ found  
9 plaintiff is able to perform his past work an automobile detailer,  
10 groundskeeper, and furniture deliverer. (Tr. 20.) Because the ALJ  
11 found plaintiff capable of performing past work, he was not  
12 disabled and there was no need to continue to step five.

13 Accordingly, the ALJ found that plaintiff is not disabled as  
14 defined by the Social Security Act.

#### 15 **ISSUES**

16 Plaintiff contends that the Commissioner erred as a matter of  
17 law by failing to properly credit (1) the March 22, 2005, opinion  
18 of examining mental health nurse practitioner Margaret Ann Rose,  
19 ARNP; (2) the March 28, 2006, opinion of examining psychologist  
20 Rebecca Alexander, Ph.D.,; and (3) the November 3, 2006, opinion  
21 at intake of treating professional Ann Marie Ridinger, MSW. (Ct.  
22 Rec. 12 at 2-4, 6-9.) Plaintiff alleges the ALJ improperly  
23 credited the opinion of the testifying expert, whose opinion was  
24 entitled to less weight.

25 The Commissioner responds that the ALJ appropriately weighed  
26 the medical evidence of psychological impairment and asks the  
27 Court to affirm his decision. (Ct. Rec. 14 at 6-9).

**DISCUSSION****Weighing medical evidence**

In social security proceedings, the claimant must prove the existence of a physical or mental impairment by providing medical evidence consisting of signs, symptoms, and laboratory findings; the claimant's own statement of symptoms alone will not suffice. 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated on the basis of a medically determinable impairment which can be shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once medical evidence of an underlying impairment has been shown, medical findings are not required to support the alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d 341, 345 (9<sup>th</sup> Cr. 1991).

A treating physician's opinion is given special weight because of familiarity with the claimant and the claimant's physical condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9<sup>th</sup> Cir. 1989). However, the treating physician's opinion is not "necessarily conclusive as to either a physical condition or the ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989) (citations omitted). More weight is given to a treating physician than an examining physician. *Lester v. Cater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996). Correspondingly, more weight is given to the opinions of treating and examining physicians than to nonexamining physicians. *Benecke v. Barnhart*, 379 F. 3d 587, 592 (9<sup>th</sup> Cir. 2004). If the treating or examining physician's opinions are not contradicted, they can be rejected only with clear and convincing reasons. *Lester*, 81 F. 3d at 830.



1 If contradicted, the ALJ may reject an opinion if he states  
2 specific, legitimate reasons that are supported by substantial  
3 evidence. *See Flaten v. Secretary of Health and Human Serv.*, 44  
4 F. 3d 1435, 1463 (9<sup>th</sup> Cir. 1995).

5 In addition to the testimony of a nonexamining medical  
6 advisor, the ALJ must have other evidence to support a decision to  
7 reject the opinion of a treating physician, such as laboratory  
8 test results, contrary reports from examining physicians, and  
9 testimony from the claimant that was inconsistent with the  
10 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
11 751-52 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9<sup>th</sup>  
12 Cir. 1995).

13 Plaintiff contends that the ALJ failed to give clear and  
14 convincing reasons for rejecting the opinion of treatment provider  
15 Ms. Ridinger that, at intake in November of 2006, plaintiff's  
16 assessed GAF was 46<sup>1</sup>. Assuming for the sake of argument that Ms.  
17 Ridinger is an acceptable medical source, the Commissioner is  
18 correct that because Ms. Ridinger's opinion is contradicted, the  
19 ALJ was required to give specific and legitimate, rather than  
20 clear and convincing, reasons for rejecting it.

21 To aid in weighing the conflicting medical evidence, the ALJ  
22 evaluated plaintiff's credibility and found him less than fully  
23 credible. (Tr. 18.) Credibility determinations bear on

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25 <sup>1</sup>A GAF (Global Assessment of Functioning) of 46 indicates  
26 serious symptoms (e.g., suicidal ideation, severe obsessional  
27 rituals, frequent shoplifting) or any serious impairment in  
28 social, occupational, or school functioning (e.g., no friends,  
unable to keep a job). DIAGNOSTIC AND STATISTICAL MANUAL OF  
MENTAL DISORDERS FOURTH EDITION (DSM -IV), at p. 32.

1 evaluations of medical evidence when an ALJ is presented with  
2 conflicting medical opinions or inconsistency between a claimant's  
3 subjective complaints and diagnosed condition. *See Webb v.*  
4 *Barnhart*, 433 F. 3d 683, 688 (9<sup>th</sup> Cir. 2005).

5 It is the province of the ALJ to make credibility  
6 determinations. *Andrews v. Shalala*, 53 F. 3d 1035, 1039 (9<sup>th</sup> Cir.  
7 1995). However, the ALJ's findings must be supported by specific  
8 cogent reasons. *Rashad v. Sullivan*, 903 F. 2d 1229, 1231 (9<sup>th</sup>  
9 Cir. 1990). Once the claimant produces medical evidence of an  
10 underlying medical impairment, the ALJ may not discredit testimony  
11 as to the severity of an impairment because it is unsupported by  
12 medical evidence. *Reddick v. Chater*, 157 F. 3d 715, 722 (9<sup>th</sup> Cir.  
13 1998). Absent affirmative evidence of malingering, the ALJ's  
14 reasons for rejecting the claimant's testimony must be "clear and  
15 convincing." *Lester v. Chater*, 81 F. 3d 821, 834 (9<sup>th</sup> Cir. 1995).  
16 "General findings are insufficient: rather the ALJ must identify  
17 what testimony not credible and what evidence undermines the  
18 claimant's complaints." *Lester*, 81 F. 3d at 834; *Dodrill v.*  
19 *Shalala*, 12 F. 3d 915, 918 (9<sup>th</sup> Cir. 1993).

20 The ALJ relied on several factors when assessing credibility:  
21 the extent of plaintiff's activities, inconsistent statements,  
22 lack of mental health treatment, and failure to follow through  
23 with recommended treatment. (Tr. 18.) The ALJ notes plaintiff's  
24 activities in June of 2005 including working at a golf course over  
25 the summer; a month earlier, in May of 2005, plaintiff "alleged he  
26 could no longer work because he had "intolerable pain in his  
27 joints, back, and neck, and he was suffering from severe  
28 depression and anxiety." (Tr. 18, comparing Exhibit 1/92f with

1 Exhibit 1/32E.) After Ms. Ridinger's November 2006 intake opinion  
2 (Tr. 179-183), the ALJ notes plaintiff failed to follow through  
3 with treatment. (Tr. 15, referring to Tr. 183.) The ALJ observes  
4 that if plaintiff's mental health problems were not severe enough  
5 to motivate him to seek treatment, "it is difficult to accept his  
6 assertion that they were disabling." (Tr. 18.) Noncompliance  
7 with medical care or unexplained or inadequately explained reasons  
8 for failing to seek medical treatment cast doubt on a claimant's  
9 subjective complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v.*  
10 *Bowen*, 885 F. 2d 597, 603 (9<sup>th</sup> Cir. 1989).

11 The ALJ's reasons for finding plaintiff less than fully  
12 credible are clear, convincing, and fully supported by the record.  
13 *See Thomas v. Barnhart*, 278 F. 3d 947, 958-959 (9<sup>th</sup> Cir.  
14 2002)(proper factors include inconsistencies in plaintiff's  
15 statements, inconsistencies between statements and conduct, and  
16 extent of daily activities).

17 The ALJ credited some but not all of the March 28, 2006,  
18 opinion of examining psychologist Dr. Alexander:

19 The undersigned finds that the marked limitations noted  
20 by Dr. Alexander are not supported by the record to be  
21 long term problems. Dr. Alexander found that the  
22 claimant had the cognitive capacity to be successful  
23 in the workplace if he was motivated. She recommended  
24 that the claimant pursue counseling and treatment with  
25 psychotropic medications<sup>2</sup>, and participate in vocational  
26 rehabilitation. She also suggested that the claimant  
27 may be claiming to be depressed in an attempt to  
28 receive secondary gain. Exhibit 1/52F. The undersigned  
gives more weight to the assessment of Dr. Bennett who

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26 <sup>2</sup>The record shows that plaintiff in general experienced a  
27 greater sense of well-being when on celexa. He reported to  
28 treating physician Patrick Clark, M.D., that when he missed  
his medication, people notice it because he is more irritable  
or frustrated. (Tr. 203.)

1 found that with treatment, the claimant's depression  
2 would improve within 12 months and the claimant was  
currently able to sustain a normal workday and workweek.  
Exhibit 1/68F.

3 (Tr. 19.)

4 The ALJ relied on the testimony of Dr. Bostwick in assessing  
5 the medical evidence. (Tr. 16-20.) Dr. Bostwick reviewed the  
6 record and opined that plaintiff's primary diagnosis is a  
7 depressive disorder. (Tr. 247-248.) He agreed with examining  
8 psychologist Dr. Alexander and examining psychiatrist Russell  
9 Bennett, M.D., that plaintiff's symptoms do not meet the criteria  
10 for bipolar disorder, nor for ADHD. (Tr. 250.) The ALJ notes Dr.  
11 Bennett's July 2005 opinion that plaintiff's PTSD was resolving.  
12 (Tr. 15, referring to Tr. 176: "Probable history of resolving post  
13 traumatic stress disorder."] Dr. Bostwick opined that plaintiff's  
14 depressive disorder results in, at most, a moderate limitation in  
15 the ability to maintain attention, concentration and persistence  
16 for extended periods, and in the ability to interact appropriately  
17 with the general public. (Tr. 253-254.)

18 The ALJ relied on evidence in addition to the testimony of  
19 the nonexamining medical expert in rejecting some of the other  
20 medical opinions, specifically, the opinion of examining  
21 psychiatrist Dr. Bennett, and his assessment of plaintiff's  
22 credibility, both specific and legitimate reasons. See  
23 *Magallanes*, 881 F. 2d at 751-52 (9<sup>th</sup> Cir. 1989); *Andrews*, 53 F. 3d  
24 at 1042-43 (9<sup>th</sup> Cir. 1995).

25 The ALJ is responsible for reviewing the evidence and  
26 resolving conflicts or ambiguities in testimony. *Magallanes v.*  
27 *Bowen*, 881 F. 2d 747, 751 (9<sup>th</sup> Cir. 1989). It is the role of the  
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1 trier of fact, not this court, to resolve conflicts in evidence.  
2 *Richardson*, 402 U.S. at 400. The court has a limited role in  
3 determining whether the ALJ's decision is supported by substantial  
4 evidence and may not substitute its own judgment for that of the  
5 ALJ, even if it might justifiably have reached a different result  
6 upon de novo review. 42 U.S.C. § 405 (g).

7 The ALJ provided clear and convincing reasons supported by  
8 the record for finding plaintiff's allegations not fully credible.  
9 The ALJ weighed the medical evidence and failed to adopt some of  
10 the opinions of some treating and examining professionals.  
11 Instead, the ALJ relied on the opinions of other examining and  
12 consulting physicians and on his assessment of plaintiff's  
13 credibility. The ALJ's assessment of the  
14 medical and other evidence is supported by the record and free  
15 of legal error.

#### 16 CONCLUSION

17 Having reviewed the record and the ALJ's conclusions, this  
18 court finds that the ALJ's decision is free of legal error and  
19 supported by substantial evidence..

#### 20 IT IS ORDERED:

21 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 13**) is  
22 **GRANTED.**

23 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 10**) is  
24 **DENIED.**

25 The District Court Executive is directed to file this Order,  
26 provide copies to counsel for Plaintiff and Defendant, enter  
27 judgment in favor of Defendant, and **CLOSE** this file.

28 DATED this 29th day of October, 2008.

s/ James P. Hutton

JAMES P. HUTTON  
UNITED STATES MAGISTRATE JUDGE